

BETWEEN ANGELIQUE FREDATOVICH
Applicant

A N D TREASURY WINE ESTATES
(NZ) LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: G D Bennett, Counsel for Applicant
E J Butcher, Counsel for Respondent

Investigation Meeting: 27 and 28 November 2012 at Auckland

Submissions Received: 28 November 2012 from Applicant
28 November 2012 from Respondent

Date of Determination: 17 April 2013

DETERMINATION OF THE AUTHORITY

- A. Ms Fredatovich was justifiably dismissed and not disadvantaged in her employment by Treasury Wine.**
- B. Costs submissions are to be filed within 21 days of the date of this determination.**

Employment relationship problem

[1] Angelique Fredatovich was employed by Treasury Wine Estates (NZ) Limited (Treasury Wine) in 2007 as an Executive Assistant to the Regional Business Unit Director, Oliver Horne. The role was expanded to include Events Manager from 2009. Treasury Wine markets several brands of wine throughout New Zealand and

internationally. Ms Fredatovich was dismissed due to allegations about her event management of Treasury Wine stalls at the Auckland and Wellington Food shows.

[2] Ms Fredatovich had previously organised the Treasury Wine stall at a Food Show in 2010 and was instructed to manage this event again at Auckland and Wellington in 2012. The main purpose of the Food Show Stalls was brand awareness, although some retail sales of wine occurred as well.

[3] The Wellington Food Show was held in May 2012 over three days. Ms Fredatovich booked the stall and ordered 300 cases of various wines and an electronic till to be delivered to the venue. She checked the amount of wine that arrived but undertook no further stock management thereafter.

[4] During the Show wine was sold, used for sampling and for “contras” – bottles exchanged for goods in kind e.g. cheese to complement the wine on the stall. At the end of each day the half empty bottles were thrown out. Some full bottles of wine were accidentally broken. There was no record taken of the number of bottles of wine sold, sampled, wasted, broken or used as “contras.”

[5] There were substantial amounts of cash from retail sales at the Show. Ms Fredatovich was unfamiliar with the electronic till and had concerns it may slow up sales during busy periods. She used the electronic till as a secure cash box, instructing staff on how to open the till quickly by pressing two buttons without recording the cash sale. There was no record of cash sales made.

[6] Over the three day Food show cash was held in various places on the stall. Between \$1,000 and \$2,000 coinage was kept in Ms Fredatovich’s handbag. The remaining cash was in the till and packets spread about the stall. At the end of the Show, Ms Fredatovich would put the various cash packets into a folder.

[7] When the Wellington Show concluded, Ms Fredatovich helped two Treasury Wine staff members load cases of wine into the back of their cars to be taken to the Treasury Wine Wellington office. The remaining bottles were picked up by a freight company and taken to a warehouse for storage. There was no record of the remaining number of bottles at the end of the show. The freight company recorded 96 cases returned to the warehouse.

[8] Due to the weight of the coinage in her handbag, Ms Fredatovich decided to exchange it for notes at a local bank. She handed the coinage to the teller at a bank in Wellington central and received the exact same amount in notes in return without any cash handling fee. There was no record of this transaction.

[9] Ms Fredatovich returned from the Wellington Food Show to Auckland late. She went home with cash from the Show and left it in a folder at her home. She brought the folder of money into work and put this in a locked cupboard.

[10] The Auckland Food Show occurred between 2 to 5 August 2012. Ms Fredatovich ordered 515 cases of wine to be delivered to the venue. At the end of the Auckland Food Show 285 cases were returned. There was no record of the number of bottles of wine sold, sampled, wasted, broken or used as “contras.” There was no record of cash sales made. Leftover stock was returned to their warehouse.

[11] On 13 August 2012 Treasury Wine asked Ms Fredatovich to provide the cash takings from the Auckland Show for banking. These were received on 15 August 2012. The total amount received was \$4,910 from the Auckland and Wellington Food Shows.

[12] Treasury Wine carried out a reconciliation of the total takings from both shows estimating the wine sold and used at the Shows against stock returned to their warehouse. It believed there was a cash shortfall of \$7,865.00, comprised of \$4,600 from the Wellington Food Show and \$3,265 from the Auckland Food Show.

[13] The Regional Business Unit Director, Mr Horne, provided Ms Fredatovich with a letter dated 4 September 2012¹ inviting her to a formal meeting and setting out allegations arising from her conduct at the Food Shows. These included the deficit in cash based upon the above reconciliation and deficiencies in her cash handling and stock management. They attached a copy of the above reconciliation showing the shortfalls from both Food Shows.

[14] Mr Horne met with Ms Fredatovich on 4 September 2012. He went through the letter and asked her to provide any other cash she may have from the Food Shows. Ms Fredatovich searched her offices without success then indicated there may be cash

¹ Document 4.2

in a locked cupboard for which she had no keys. Mr Horne broke into the cupboard but found no cash.

[15] Later that evening Ms Fredatovich texted Mr Horne advising she had found \$3,000 at her home. Funds given to Treasury Wine for banking the next day totalled \$3,950.

[16] On 7 September 2012 Ms Fredatovich met again with Mr Horne and the Human Resources Manager, Linda Rouse. Ms Fredatovich provided an explanation for the allegations including:

- (a) 30 cases of wine were loaded into the Regional Manager's car (Ms Debbie Drake) and a Sales Representative's car, Mr Tristram Fletch from the Wellington Food Show.
- (b) More stock (80 cases) was used for sampling than estimated by Treasury Wine (64 cases).
- (c) Cash returned from the Wellington Food Show was in \$50 notes because it was changed from coins to \$50 notes at a Wellington bank.
- (d) She had never been required to account for cash takings and stock from previous food shows because these were not viewed as money making opportunities, but marketing activities. Therefore she did not think it was necessary to record and reconcile cash transactions at the Shows.
- (e) Ms Fredatovich produced her own spreadsheet reconciling stock and cash with the amount Treasury received from her for banking (\$8,860).

[17] On 10 September 2012 Ms Fredatovich sent an email to the National Financial Manager, Ms Claire Hobday, naming various Wellington banks she may have visited to exchange coinage for \$50 notes.

[18] Treasury Wine carried out further investigations based on the information received from Ms Fredatovich including contacting the named banks and interviewing various staff about the wine sampling at the shows and the stock returned.

[19] On 11 September 2012 Treasury Wines sent a letter to Ms Fredatovich² outlining its proposed decision to dismiss her. The basis for the decision was:

- (a) Ms Drake did not attend the Wellington Show. The reference to Ms Drake appeared to have been dishonest. Mr Fletch confirmed only nine cases were returned to the Wellington office.
- (b) Based upon the sample serving sizes estimated by staff who worked at the Auckland Food Show the amount of stock for sampling would be closer to the original estimate of 64 cases, not the 80 cases estimated by her.
- (c) Treasury Wine was unable to verify the bank or the cash exchange transaction.
- (d) Her unusual behaviour following the disciplinary meeting having no keys to the locked cupboard where she said the cash may be, forcing entry into the cupboard and finding no cash and her later advice she found \$3,000 at her home but provided \$3,950 for banking.
- (e) The cash banked did not cover the discrepancy calculated by Treasury Wines. The delay in returning the cash to the company was a serious neglect of her duties.
- (f) Ms Fredatovich had no method for tracking and recording stock for sale, sampling or contra arrangements. She also had no reliable method for recording or reconciling cash transactions.
- (g) A warning was considered but there had been damage to the trust between the parties.

[20] He gave Ms Fredatovich a further opportunity to reply to the letter no later than 13 September 2012.

[21] On 12 September 2012 Ms Fredatovich's solicitor sent a letter³ alleging failures to follow disciplinary policy and provide copies of evidence including statements gathered during investigation resulting in her being unable to fully respond

² Document 4.2

³ Document 4.3

to the allegations. She disputed the calculations of wine sampled used in Treasury Wine's reconciliation and criticised their lack of cash handling and stock management policies. It was accepted she failed to separate the cash from the Wellington and Auckland Food shows and forgot to return it to Treasury Wine. She sought copies of various documents.

[22] Treasury Wine's solicitors responded on 14 September 2012.⁴ They denied any failure to follow policy or provide documentation to Ms Fredatovich. No statements were taken from staff during the investigations. Any other documentation sought was not relied upon by Treasury Wine in reaching its proposed decision.

[23] Ms Fredatovich's solicitor replied on 17 September 2012.⁵ She accepted she had failed in her duty to return the cash but it was not intentional. She criticised the investigation regarding the bank she exchanged the coinage for \$50 notes, the company's relaxed manner of stock management and cash handling and lack of notes or statements. She disputed trust and confidence between the parties had been destroyed by her actions.

[24] On 20 September 2012 Treasury Wine's solicitors advised Ms Fredatovich her employment had been terminated for the reasons set out in the 11 September 2012 letter.⁶

Issues

[25] The issues which arise in this employment relationship problem are:

- a) Was Ms Fredatovich unjustifiably disadvantaged by the investigation into the allegations?
- b) Was Ms Fredatovich unjustifiably dismissed?
- c) If so, what remedies should be ordered?

Was Ms Fredatovich unjustifiably disadvantaged?

[26] Unjustifiable disadvantage is where *"the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives*

⁴ Document 4.4

⁵ Document 4.5

⁶ Document 4.6

termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.” Ms Fredatovich alleges she was disadvantaged in her employment by the failures to carry out a fair and reasonable investigation and to consider custom and practice at previous Food Shows.

[27] The same allegations are raised in respect of the unjustified dismissal. To avoid duplication, the findings of fact relevant to this issue are dealt with in the unjustified dismissal claim below.

Was Ms Fredatovich unjustifiably dismissed?

[28] Ms Fredatovich claims she was unjustifiably dismissed because:

- a) Treasury Wine did not undertake a proper investigation or provide sufficient information to her;
- b) Treasury Wine HR manager provided false information regarding interviewing Mr Craig Jonas and the weight they gave to it
- c) No statements from employees or notes of meetings were provided to her during the investigation
- d) There was no mention of termination until the Treasury Wine letter dated 11 September 2012;
- e) The reasoning for the proposed decision to dismiss in the letter dated 11 September 2012 was based upon information Ms Fredatovich was not provided with. This was a breach of natural justice; and
- f) Treasury Wine had predetermined its view and/or closed its mind to other options resulting in a biased view.

[29] Treasury Wine disagrees. It states it acted as a fair and reasonable employer could do in the circumstances. Ms Fredatovich gave unsatisfactory explanations and there were serious failures in stock management and cash handling during the Food Shows including retaining cash from the Shows at her home for a significant period of time. The behaviour amounted to serious misconduct impairing the trust and confidence in the employment relationship and warranting summary dismissal. If the

dismissal was unjustified Treasury submits there was contributory conduct reducing any remedies by 100%, including subsequently discovered misconduct and insufficient evidence of compensation for hurt and humiliation.

Legal Framework

[30] The fact Ms Fredatovich was dismissed is accepted. The onus falls upon Treasury Wines to justify whether its actions “*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*”.⁷

[31] The Authority must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s103A(5)).

[32] There is a substantial conflict of evidence between the parties. This requires express findings of credibility upon evidence given by brief and orally at hearing.

[33] Credibility can be assessed upon two bases – the witness personally, and the story the witness tells. Relevant factors to personal credibility are inconsistencies and contradictions; prevarication; motivation to lie; concessions made where due, despite risk to the witnesses own credibility in giving that evidence.

[34] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?

[35] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation. Bearing this framework in mind, the Authority turns to consider the matter before it.

Facts Leading to Dismissal

⁷ S103A(2)

[36] The facts leading to the dismissal are set out in paragraphs [1] to [24] above. There is a dispute whether Ms Fredatovich's behaviour was serious misconduct sufficient to impair trust and confidence between the parties. There is a dispute whether the process set out in paragraphs [12] to [24] was defective and if those defects were minor and resulted in unfairness.

Was this serious misconduct?

[37] Serious misconduct *will generally involve deliberate action inimical to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*⁸ However, the Authority must still assess whether this is *conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*⁹

[38] An essential implied term in any employment contract is trust and confidence.¹⁰ Even where there is no suggestion of wilful disobedience, a single act of carelessness, when sufficiently serious, can impair trust and confidence justifying dismissal.¹¹

[39] Ms Fredatovich blames human error and the lack of policies and procedures for the personal grievance arising. Although the employer did not find she acted dishonestly or was wilfully disobedient, this does not mean lead to a conclusion there was no serious misconduct.

[40] The events management required her to handle significant amounts of stock and cash without oversight. As a consequence, her employer would have had to have a high level of trust and confidence that she would manage their property appropriately.

[41] It is speculative whether practice or policies could have prevented her conduct which led to this personal grievance. Six monthly and yearly performance reviews

⁸ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

⁹ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483; (1992) 4 NZELC 95,601 (CA), at p 487; p 95,603

¹⁰ *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487

¹¹ *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29; (2001) 6 NZELC 96,197; [2000] 2 ERNZ 448 (CA) at [45].

did not detect her conduct. If Treasury Wine had not raised the cash takings from the Auckland Show, the allegations about her conduct may never have been uncovered. The cash may also not have been recovered or recovered even later than August 2012.

[42] Ms Fredatovich had limited experience in events management. This was highlighted at hearing when she admitted obtaining a Bar Manager's licence by falsely stating in her application she had worked in bar. Given her limited experience, policies and practices may not have necessarily prevented her conduct from occurring.

[43] The conduct went beyond human error. The storage of cash in random places throughout the Food Show stall, in her handbag, at her home and in a locked cupboard for up to 3 months was unsafe and unsecure. Common sense would dictate cash of this amount was banked immediately or secured properly.

[44] There was great risk to Ms Fredatovich's personal safety retaining a large amount of cash on her person and at home. There was \$8,860 at her home and in a locked cupboard at work. The locked cupboard was able to be easily broken into by Mr Horne. Cash could have been stolen, misappropriated or lost during or after the Show. The risks were compounded by her retention of the cash, some of it for a number of months.

[45] The decision to exchange coinage for \$50 notes at a Wellington bank as opposed to depositing it in her employer's bank account was irrational and illogical. Ms Fredatovich should have been aware there would be large amounts of cash from the previous Food Show in 2010. There was no rational or logical explanation for why the cash was not deposited during the Shows or secured appropriately elsewhere. This should have reduced any need she may have had to take cash home from the Shows and risk in retaining the cash until it could be banked.

[46] The lack of records regarding stock sold, used in sampling, wastage, breakages and contras means it is now impossible to accurately reconcile the cash proceeds banked and stock sold or used at the Shows.

[47] Although the emphasis of the events management was on marketing as opposed to retail sales, this did not dispense with the obligation upon her to deal with her employer's cash and stock appropriately.

[48] The conduct was not human error. It was gross negligence. This was a serious breach of an implied term of trust and confidence and capable of being serious misconduct.

Was the disciplinary process what a fair and reasonable employer could have done in all the circumstances?

[49] In assessing Treasury Wines actions, the Authority must consider whether the employer:¹²

- sufficiently investigated the allegations
- raised the concerns it had with the employee
- gave the employee a reasonable opportunity to respond to the concerns
- genuinely considered the employee's explanation (if any) in relation to the allegations

Sufficiency of Investigation

[50] Ms Fredatovich submits the investigation of the allegations was insufficient due to the matters set out in paragraph [28](a) to (c) above. In particular Ms Fredatovich believed further enquiry would have yielded the name of the Wellington bank and the teller where the coinage had been exchanged for notes.

[51] Further enquiry about the Wellington bank and the teller would not have impacted upon the question of serious misconduct arising from her handling of cash and stock. At best it confirmed she was not dishonest in returning the cash in \$50 notes. But there was no finding of dishonesty by the employer on this point.

[52] The failure to take statements from employees did not prevent Ms Fredatovich from addressing the issue of serious misconduct arising from her handling of the cash

¹² s103A(3)

and stock. She was given a spreadsheet setting out the alleged discrepancy between the estimated stock used or expected sold and cash proceeds received based upon the information received from employees. She did respond fully to the allegations by producing her own spreadsheet showing how she reconciled the amount of cash she tendered for banking and her estimates of stock sold, sampled, wastage, breakages and contras which she did in compiling her spreadsheet.

[53] Ms Fredatovich alleges she ought to have been provided with copies of the disciplinary meeting notes. The notes were provided in discovery. At hearing she took no issue about the accuracy of the meeting notes produced. Earlier production would have had little (if any) effect upon her responses to the allegations.

[54] Ms Fredatovich alleged failures and misleading information regarding interviewing her partner, Mr Craig Jonas, prior to the decision being made. Mr Jonas' evidence at best provided corroboration of her evidence which Treasury Wine was aware of. He would not have advanced any reasonable explanation for the serious misconduct that Ms Fredatovich had not already proposed. There was little to be gained from interviewing Mr Jonas prior to the decision being made.

Raised Concerns & Reasonable opportunity to respond

[55] These matters are set out in paragraph [28](d) to (e). Ms Fredatovich alleges prior to the proposed decision to terminate set out in the 11 September letter,¹³ the employer failed to raise termination as a possible outcome of the disciplinary process. This is incorrect. The letter dated 4 September 2012 raises termination of employment as a possible outcome under the heading reconciliation discrepancies¹⁴ although a later statement under the heading stock and cash management infers a warning may suffice.¹⁵

[56] If there was a lack of clarity around possible termination before, this was rectified in the letter of 11 September 2012. The letter clearly made her aware termination was likely, set out the reasons for the proposed decision and gave her a

¹³ Document 4.2

¹⁴ Document 4.1 page 2 paragraph 8.

¹⁵ See above page 3 paragraph 2.

further opportunity to respond, which she did. Any defect was minor and did not result in unfairness.

[57] Ms Fredatovich does not clarify what additional information the employer relied upon to make the decision other than taking witness statements and minutes of meeting. For the reasons set out in paragraphs [51] to [54] above, this information would not have impacted upon her ability to reply to the allegations or the decision making.

Genuine consideration of explanation

[58] Ms Fredatovich alleges Mr Horne was biased and pre-determined he would dismiss her. The basis for this allegation is Treasury Wine's conduct in refusing to disclose all information she had requested and changing its view on penalty¹⁶ from warning to dismissal.

[59] As set out in paragraphs [51] to [54] above, the information requested would have provided little, if any, assistance in the decision making.

[60] An employer, following investigation and an opportunity for an employee to respond, is entitled to change its mind on penalty. Otherwise this would evidence pre-determination.

[61] Given the above findings, the Authority determines the dismissal was justified and there was no disadvantage in Ms Fredatovich's employment.

[62] Costs submissions are to be filed within 21 days of the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority

¹⁶ Applicants submissions paragraphs 18 ff